

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN**

BAD RIVER BAND OF THE LAKE  
SUPERIOR TRIBE OF CHIPPEWA  
INDIANS OF THE BAD RIVER  
RESERVATION,

*Plaintiff,*

v.

ENBRIDGE ENERGY COMPANY, INC.,  
and ENBRIDGE ENERGY, L.P.,

*Defendants.*

ENBRIDGE ENERGY COMPANY, INC.,  
and ENBRIDGE ENERGY, L.P.,

*Counter-Plaintiffs,*

v.

BAD RIVER BAND OF THE LAKE  
SUPERIOR TRIBE OF CHIPPEWA  
INDIANS OF THE BAD RIVER  
RESERVATION and NAOMI TILLISON,  
in her official capacity,

*Counter-Defendants.*

Case No. 3:19-cv-00602-wmc

Judge William M. Conley  
Magistrate Judge Stephen L. Crocker

**PLAINTIFF BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA  
INDIANS' PROPOSED FORM OF SPECIAL VERDICT**

Pursuant to the Court's Opinion and Order of September 16, 2022, at 4 (Dkt. 369), Plaintiff Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation ("Band") respectfully requests that the Court use the following proposed special verdict form.

## SPECIAL VERDICT

### SPECIAL VERDICT PART I: MEASURE OF PROFITS-BASED RELIEF FOR PAST UNJUST ENRICHMENT AND CONSCIOUS TRESPASS

1. What is the proper amount of profits-based relief for Enbridge's unjust enrichment and conscious trespass to date?

\$ \_\_\_\_\_

### SPECIAL VERDICT PART II: MEASURE OF PROFITS-BASED RELIEF FOR ANY FUTURE PIPELINE OPERATION

1. What is the proper amount of profits-based relief for any future period of time during which Enbridge continues to operate Line 5 on the Reservation?

\$ \_\_\_\_\_

### SPECIAL VERDICT PART III: PUBLIC NUISANCE LIABILITY

1. Would a rupture of Line 5 in the vicinity of the Bad River Meander constitute an unreasonable interference with the public rights, health, safety or welfare of the Band?

\_\_\_\_\_ Yes \_\_\_\_\_ No

2. Given the probability and magnitude of the potential harm, is the risk of a rupture of Line 5 at the Bad River Meander more than a reasonable person would incur, such that equitable relief is necessary?

\_\_\_\_\_ Yes \_\_\_\_\_ No

3. Is Enbridge's continued operation of the pipeline at the Bad River Meander the cause of any "unreasonable interference with the public rights, health, safety or welfare of the Band" arising out of the operation of the pipeline at that location?

\_\_\_\_\_ Yes \_\_\_\_\_ No

4. Would Enbridge's proposed remediation projects at the Meander require entry upon and alteration to Reservation lands and waters with respect to which it has no valid easement or other property rights?

Yes  No

5. Can Enbridge defeat nuisance liability by proposing to engage in remediation projects at the Meander that would require entry upon and alteration to Reservation lands and waters with respect to which it has no valid easement or other property rights?

Yes  No

6. Has Enbridge obtained for its proposed remediation projects at the Meander all water quality certifications, permits, and other environmental approvals from the Band, the U.S. Army Corps of Engineers, and other entities as required under federal and Band law?

Yes  No

7. Can Enbridge defeat nuisance liability by proposing to engage in remediation projects for which it has not obtained water quality certifications, permits, and other environmental approvals from the Band, the U.S. Army Corps of Engineers, and other entities as required under federal and Band law?

Yes  No

8. Do Enbridge's proposed remediation projects at the Meander pose a threat of adverse environmental consequences to Reservation resources?

Yes  No

9. Do Enbridge's proposed remediation projects at the Meander have a non-trivial risk of project failure?

Yes  No

10. Can Enbridge defeat nuisance liability by proposing to engage in remediation projects that pose a threat of adverse environmental consequences to Reservation resources and/or that have a non-trivial risk of project failure?

Yes  No

**SPECIAL VERDICT PART IV: ENTITLEMENT TO INJUNCTIVE RELIEF FOR PUBLIC NUISANCE**

1. Is an injunction necessary to prevent irreparable harm to the Band?

Yes  No

2. Are the remedies available at law adequate to compensate for such harm?

Yes  No

3. Does the balance of hardships from granting or denying injunctive relief weigh in favor of the Band?

Yes  No

4. Would an injunction serve the public interest?

Yes  No

5. Do the above four factors weigh in favor of an injunction?

Yes  No

**SPECIAL VERDICT PART V: FORM OF INJUNCTIVE RELIEF**

1. Is Enbridge entitled to an injunction allowing continued operation of Line 5 on the Reservation for an indefinite period of time absent compliance with the tribal and federal consent requirements set forth in the Non-Intercourse Act, 25 U.S.C. § 177, the 1948 Right of Way Act, 25 U.S.C. §§ 323–28, and the 1854 Treaty with the Chippewa, 10 Stat. 1109?

Yes  No

2. Given the probability and magnitude of the potential harm from a rupture of Line 5 on the Reservation, would the public interest be served by an injunction that allows for the continued operation of Line 5 on the Reservation indefinitely?

Yes  No

3. Should the Court issue an injunction allowing for continued operation of Line 5 on the Reservation for a longer time period than what is necessary to allow Enbridge and other market actors to develop alternatives to Line 5 sufficient to protect the public interest?

\_\_\_\_\_ Yes \_\_\_\_\_ No

4. Does the public interest require permitting Enbridge to remain on the Reservation for an indefinite period of five years or more?

\_\_\_\_\_ Yes \_\_\_\_\_ No

5. For what time period does the public interest require permitting Enbridge to continue to operate Line 5 on the Reservation?

\_\_\_\_\_

Dated: September 21, 2022

Respectfully submitted,

Erick Arnold  
BAD RIVER BAND OF THE LAKE SUPERIOR  
TRIBE OF CHIPPEWA INDIANS OF THE BAD  
RIVER RESERVATION  
72682 Maple Street  
Odanah, Wisconsin 54861  
attorney@badriver-nsn.gov  
(715) 682-7107

Bruce Wallace  
HOOPER HATHAWAY PRICE BEUCHE  
& WALLACE  
126 S. Main Street  
Ann Arbor, MI 48104  
bwallace@hooperhathaway.com  
(734) 662-4426

Oday Salim  
NATIONAL WILDLIFE FEDERATION  
213 West Liberty Street, Suite 200  
Ann Arbor, MI 48104  
salimo@nwf.org  
Ph: (586) 255-8857

/s/ Riyaz A. Kanji  
Riyaz A. Kanji  
David A. Giampetroni  
Lucy W. Braun  
KANJI & KATZEN, P.L.L.C.  
303 Detroit Street, Suite 400  
Ann Arbor, MI 48104  
rkanji@kanjikatzen.com  
dgiampetroni@kanjikatzen.com  
lbraun@kanjikatzen.com  
Ph: (734) 769-5400

Jane G. Steadman  
Philip H. Tinker  
Claire R. Newman  
KANJI & KATZEN, P.L.L.C.  
811 1<sup>st</sup> Avenue, Suite 630  
Seattle, WA 98104  
jsteadman@kanjikatzen.com  
ptinker@kanjikatzen.com  
cnewman@kanjikatzen.com  
Ph: (206) 344-8100

*Counsel for the Bad River Band of the Lake Superior  
Tribe of Chippewa Indians and Naomi Tillison, Director  
of the Mashkiiziibii Natural Resources Department of  
the Bad River Band, in her official capacity*